PERUMAHAN FARLIM (PG.) SDN. BHD. & ORS.

v.

CHENG HANG GUAN & ORS.

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
HARUN HASHIM SCJ
MOHD. YUSOFF MOHAMED SCJ
[SC CIVIL APPEAL NO. 126 OF 1988]
24 JULY 1989

LANDLORD AND TENANT: *Termination of tenancy - Control of Rent Act 1966 - Right of self-help.*

CIVIL PROCEDURE: *Injunction - Interlocutory - Preservation of status quo.*

CIVIL PROCEDURE: *Res judicata - Estoppel or issue estoppel - Order 89 of the Rules of the High Court 1980.*

This appeal concerns one of the many cases relating to the land known as the Thean Teik Estate belonging to the trustees of the Leong San Thong Khoo Kongsi, Penang.

This is an appeal, relating to the house no. 259H/301 and the vegetable land, against the decision of Edgar Joseph Jr. J in granting interim injunction against the 3rd and 4th defendants.

The defendants contended that the plaintiffs should not apply for injunction the second time by reason of estoppel unless there were changed circumstances and although the 3rd and 4th defendants were not named as parties in the earlier proceedings, they were not strangers to the proceedings by reason of their involvement in the development of the land and they had abided by the earlier injunction.

Held:

[1] The learned Judge was not wrong and the Court has no reason to interfere with his decision. There are serious questions to be tried as to the plaintiff's alleged right to remain in occupation not only of the two dwelling houses but the farm as well. The object of an interlocutory interim injunction is to preserve matters in *status quo* until the case can be tried. It cannot be considered as affecting the ultimate decision of a cause.

[2] On the preliminary point raised by the defendants on the issue of *res judicata* and estoppel or issue estoppel, there is distinction between them. There are some judicial *dicta* to the effect that by a plea of *res judicata* the other party is estopped from rekindling the earlier cause of action on which judgment was given. *Res judicata* cannot be treated simply as a branch of the law of estoppel. While it is true that an estoppel operates as a bar, this does not mean in reverse that all bars are estoppels.

[Appeal dismissed with costs.]

Cases referred to:

Duchess of Kingston's case [1776] 2 Smith LC
Douglas v. Forrest [1828] 4 Bing 686
Don v. Lippmann [1837] 5 Cl & Fin 1
Holland v. Clark [1842] 1 Y & C Ch Cas 151
Re South American and Mexican Co., Ex parte Bank of England [1895] 1 Ch 37
R. v. Blakemore [1852] 21 CJMC 60
Re Allsop and Joy's Contract [1889] 61 LT 213
AG for Trinidad v. Eriche [1893] AC 518
O'Connor v. O'Connor [1916] 2 IR 148

Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. [1966] 2 All ER 536
Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors. v. Poh Swee Siang [1987] CLJ (Rep) 404
Cheng Hay Gun & Ors. v. Perumahan Farlim (Pg) Sdn. Bhd. & Anor. [1983] CLJ (Rep) 489
Gourlet v. Union of Post Office Workers [1977] 3 WLR 300
Corporation of Birmingham v. Allen [1877] 6 Ch D 274
American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396
Sidek bin Hj. Muhamad and Letchumi Ammal v. Nam Fong Housing Sdn. Bhd. [1982] CLJ (Rep) 168
Chamberlain v. Deputy Commissioner of Taxation [1987] 62 AJLR 324
Gilbert v. Endean [1878] Ch D 259

Legislation referred to:
Specific Relief Act 1950, s. 7

For the appellants - J.A. Yeoh (R. Rasasingam with him); M/s. Shearn Delamore & Co. & Drew & Napier
For the respondents - G.S. Nijar (Mohideen Abdul Kader & Meenakshi Kantan with him); M/s. Meena Rajes & Partners

JUDGMENT

Lee Hun Hoe CJ (Borneo):

This appeal concerns one of the many cases relating to the land known as the Thean Teik Estate belonging to the trustees of the Leong San Tong Khoo Kongsi, Penang and involving the ground tenants of that land. The owners decided to develop their land into a small township. They engaged the defendants to do so. The land covered an area of over 400 acres and there were about 500 houses on the land. The owners of these houses are ground tenants paying ground rentals. Some of the tenants also rented out portions of the land adjacent to their houses for cultivation of vegetable and fruit trees and were paid separate rentals. The owners agreed to a scheme of compensation for the tenants which were accepted by some tenants and rejected by others including the plaintiffs/respondents.

The defendants/appellants as developers proceeded to carry out development works, like levelling the grounds by bulldozers on those parts of the land that were vacant. During the development operations the plaintiffs' vegetable plots were at some places affected and in fear of further damage the plaintiffs filed a suit on 6 June 1982 asking for an injunction to stop the defendants from trespassing encroaching or interfering with the quite tenancy of both the premises (i.e. the houses where the plaintiffs are staying and the vegetable plots).

The matter came before Mustapha Hussain J (reported in [1983] CLJ (Rep) 489). In regard to the houses the defendants' Counsel undertook not to disturb the quiet occupation of the houses by the plaintiffs and the Court only dealt with the question of the vegetable lands in this case was not within the definition of "premises" to attract the protection of the Control of Rent Act 1966 and the landlord can terminate the tenancy. The learned Judge dismissed the plaintiffs' application for injunction with costs.

The 2nd plaintiff affirmed an affidavit on behalf of himself and the 1st plaintiff. The 3rd plaintiff passed away in 1986. He stated that in late 1800 their grandfather Cheong Ah Pet became a tenant of a part of the land belonging to Leong San Tong Khoo Kongsi. On this plot of land their grandfather built a house known as No. 288K/426 and carried on general farming on that part of the land. Sometime in 1963 their family had grown very large. So their grandfather constructed on part of the land another house known as No. 259H/301 with the consent and knowledge of the land owners. Their grandfather died on 10 September 1969.

Since then the 1st and the 2nd plaintiffs had been paying the rents. The Khoo Kongsi issued receipts in the name of their grandfather. The plaintiffs had been paying rents in respect of premises Nos. 258K/426 and 259H/301 to the Khoo Kongsi and for which receipts were issued. Also, it was contended that No. 258K/426 was subject to the Control of Rent Act 1966 and is not the subject of this appeal.

We are concerned with No. 259H/301 and the vegetable land.

The 1st defendants were developers and the 2nd defendants were the nominated contractors of 1st defendants in the actual development of the said land. The 2nd defendants had since been replaced by the 3rd defendants. The plaintiffs applied for interlocutory injunction against the 1st and the 2nd defendants. Their application was dismissed by Mustapha J on 30 September 1982.

Subsequent to the filing of the writ of this action the Khoo Kongsi issued notice to quit dated 30 June 1982 and 20 July 1982 purporting to terminate the tenancy. On 17 March 1988 between 7.00 am and 2.45 p.m. about 100 of the 3rd and 4th defendants' servants and/or agents came to their farmland with 8 bulldozers and several lorries and destroyed their vegetable plots worth a sum of RM3,000, chicken coops, pig sties, water pipes and toilets which were located near their premises. Some of the workers were walking around the vicinity of their premises. There were also over 100 policemen in the vicinity. The 2nd plaintiff tried to prevent the defendants from further damaging their premises. Despite repeated demands and resistance the defendants continued with their highhanded operations. They only stopped when the plaintiffs' solicitors arrived at the scene at 2.45 p.m. after obtaining an interlocutory injunction.

The defendants were provoking a breach of the peace with full knowledge that a similar provocation has resulted in the death of a resident Tan Siew Kee on 29 October 1982.

Having heard the parties, Edgar Joseph Jr J granted the plaintiff an interim injunction in respect of the vegetable land on 17 March 1988. The defendants appealed.

Mustapha J dismissed the application for injunction on 30 September 1982. The argument of the defendants is that the order made by Mustapha J is still subsisting. It was not in dispute that the 1st and the 2nd defendants entered the vegetable land on 17 March 1988. They were merely following Mustapha J's judgment as reported in [1983] CLJ (Rep) 489.

The practical effect of the said order is that the defendants' developer can enter and develop the vegetable plots but not to disturb the house which the plaintiffs are occupying. It is the contention of the defendants that there are now two High Court orders - one made by Mustapha J on 30 September 1982 and the other by Edgar Joseph Jr J on 7 April 1988. He maintained that there was no basis for Edgar Joseph Jr J to make the latter order. In answer the plaintiffs pointed out that the first order was made some six years ago against the 1st and the 2nd defendants.

The plaintiffs took out summons - in - chambers dated 21 March 1988 and applied to add the 3rd and the 4th defendants as parties. Prayers (a) and (b) were made with consent of parties but (c) was disputed. These prayers read:

(a) that Perumahan Farlim (Malaysia) Sdn. Bhd. and Thean Tatt Construction Sdn. Bhd. be added as the third and fourth defendants

(b) that the plaintiffs be at liberty to amend the writ and the statement of claim to include the abovesaid two parties as defendants.

(c) that the third and fourth defendants whether by themselves or their servants or agents or otherwise howsoever be restrained from entering, trespassing and/or carrying out works on that portion of the land forming part of holding No. 2532, Mukim 13, NED Penang and Lot 2497, Mukim 13, NED Penang and on which are situated the plaintiffs premises bearing No. 426/258K and 301/259H Mukim 13, Thean Teik Estate and their vegetable farm.

The defendants questioned the plaintiffs' entitlement to the injunction against 3rd and the 4th defendants. Edgar Joseph Jr J decided in favour of the plaintiffs by making the order dated 7 April 1988. The defendants appealed to this Court.

The defendants contended that the plaintiffs should not apply for injunction the second time by reason of estoppel unless there were changed circumstances. Edgar Joseph Jr J stated at p. 58 of the Supplementary Appeal Record:

> Firstly, it is trite law that for a judicial decision to operate as *res judicate* it must be final in the sense that it leaves nothing to be judicially determined or ascertained thereafter in order to render it effective and capable of execution, and is absolute, complete, and certain, and when it is not lawfully subject to subsequent rescission, review or modification by the tribunal which pronounced it.

He went on to say at p. 59:

> Secondly, it is also trite law that the hearing of an application for an interlocutory injunction is not a trial on the merits ...

He expressed his opinion at p. 60 thus:

> In my opinion, the order of Mustapha J refusing the plaintiffs the interlocutory injunction insofar as the vegetable plot was concerned, on the ground that damages would be an adequate remedy, was merely a *prima facie* **view** and lacked the essential element of **finalty** since it is always open to the High Court, at the final hearing, to review the question involved and to arrive at an opposite conclusion in the light of **all** the evidence both oral and documentary should the circumstances so require ...

The defendants submitted that Edgar Joseph Jr J was wrong as *res judicata* applied also to interlocutory injunction.

Estoppel

The defendants do not quarrel with the exposition of law on estoppel by Edgar Joseph Jr J at p. 67:

> It is axiomatic that a judicial decision *inter partes* operates as an estoppel in favour of, and against parties and privies only, not third persons or strangers: see the *Duchess of Kingston's* case [1776] 2 Smith LC (13th Edn.,) 644 at 644-654.
>
> By definition, privies include any person who succeeds to the rights or liabilities of the party upon his death (see *Douglas v. Forrest* [1828] 4 Bing 686. *Don v. Lippmann* [1837] 5 Cl & Fin 1; *Holland v. Clark* [1842] 1 Y & C Ch Cas 151. (personal representatives in Sochish action) or insolvency (see *Douglas v. Forrest*), *supra* (assignees entitled to the benefit of the estoppel); *Re South American and Mexican Co., Ex parte Bank of England* [1895] 1 Ch 37 (liquidator of company liable to the estoppel) or who is otherwise identified with his or her estate or interest (see *R. v. Blakemore* [1852] 21 CJMC 60 (privy in estate); *Re Allsop and Joy's Contract* [1889] 61 LT 213. (successor in title); *AG for Trinidad v. Eriche* [1893] AC 518 PC (identical in title and interest); *O'Connor v. O'Connor* [1961] 2 IR 148 (successor in title to land) but it is essential that he who is later to be held estopped must have had some kind of interest in the previous litigation or its subject matter (per Lord Reid in *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd.* [1966] 2 AER 536.

The learned Judge very properly at p. 69 stated:

> ... I failed to see where the evidence was that the third and fourth defendants were privies to the first and second defendants respectively as alleged or at all.

The defendants explained that although the 3rd and the 4th defendants were not named as parties before Mustapha J they were not strangers to the proceedings. They were identified with the 1st and the 2nd defendants by reason of their involvement in the development of the land. Although not named the 3rd and the 4th defendants abide by the injunction.

The plaintiff pointed out that it was not proved that the 3rd and the 4th defendants were privy to the parties in the earlier injunction. Interlocutory injunction against the 1st and 2nd defendants were dismissed by Mustapha J on 30 September 1982.

But some six years later on 17 March 1988 two persons, i.e. the 3rd and the 4th defendants attempted to start demolition exercise in the face of a claim by the plaintiffs that they have an equity in the land. As on 17 March 1988 this right has yet to be decided by the Court. The plaintiffs felt that they were entitled to resist any attempt by any party unilaterally to declare that their rights after being made parties have already been established. Edgar Joseph Jr J took time to consider the matter. He decided to grant the injunction against the 3rd and the 4th defendants who appealed.

The question is whether the plaintiffs are precluded by the decision of Mustapha J on 30 September 1982 from asking for the present injunction by reason of the issue of estoppel.

Self-Help

It was submitted that the defendants had the right of self-help. In *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors. v. Poh Swee Siang* [1987] CLJ (Rep) 404 at p. 407 the position is clearly stated:

> The respondent testified that on 26 October 1982, at 2.00 p.m. in the afternoon two people from the second appellant's company came to the land and said that they would be coming the following day "to demolish". On the following day, that is 27 October 1982, a group of about 30-40 people came 'quite armed and carrying something like starting a fight' with two bulldozers. They then started to demolish the vegetable plots which they unearthed and flattened. In the process they also destroyed pipes for watering the vegetables. According to the respondent's evidence police personnel were also present when the demolition work was going on. The following day, that is 29 October 1982 the people came again at 3.30 p.m. The work of flattening the vegetable plots continued until a female employee of the respondent was shot dead. According to the respondent three acres of his vegetable plots were flattened where he had planted brinjals which were fruiting but not yet harvested.

In his affidavit at p. 45 of the appeal record in para. 21 and 2nd plaintiff stated:

> I fear that if the defendants are allowed to come into the said plot again and if my family members and I resist, then there would be a serious breach of the peace resulting in violence. The 1st plaintiff and I are prepared to deliver possession of the said plot provided the 1st defendants obtain a Court order directing us to do so.

At p. 64 of the supplementary appeal record we find Edgar Joseph Jr J made the following observations:

> It is apparent from the materials available to me that at the time of the proceedings before Mustapha J there was no reason to suppose that there was likely to be a breach of the peace in the event of the first and second defendants, their servants or agents resorting to the remedy of self-help to recover possession of the dwelling houses and the farm.

The learned Judge pointed out that:

> ...The plaintiffs are now relying, for the first time, on the point as to the risk of a breach of the peace, a point which was not argued before Mustapha J for the very good reason that no such risk then existed. Nowhere in the affidavit filed in support of the plaintiffs' application (encl. 3) before Mustapha J was there anything even implying that there would be a risk of a breach of the peace; in particular, there was no allegation therein that the plaintiffs would resist any attempt by the defendants to enter the property concerned without an order of Court.

At p. 66 he expressed the view that:

> ... Nevertheless, it is, I consider, relevant for me to have referred to the portions of the affidavit aforesaid as showing that the plaintiffs were alleging altered circumstances since the date of the order of Mustapha J dismissing their application for interlocutory injunctive relief and this is a crucial factor for purposes of investing this Court with the jurisdiction to entertain a fresh application for the like relief ...

The defendants argued that Edgar Jr J misconceived the matter. The status of the landowner had not changed. Also, the status of the plaintiffs had not changed since Mustapha J made the order. The word "status" was used because the plaintiffs never had any right. This is clear from what Mustapha J said in *Cheng Hay Gun & Ors. v. Perumahan Farlim (Pg) Sdn. Bhd. & Anor.* [1983] CLJ (Rep) 489:

> ... This Court after perusing the affidavits filed and after hearing arguments, is of the view that the plaintiffs have not succeeded in establishing claims (for an injunction on the vegetable lands) such as to succeed for a permanent injunction at the trial. Nor have the plaintiffs established a legal right to their claim recognizable by the Court to enable the Court to grant an injunction (See *Gourlet v. Union of Post Office Workers* [1977] 3 WLR 300; *Corporation of Birmingham v. Allen* [1877] 6 Ch D 284. This Court is also of the view that damages would be an adequate remedy (*American Cyanamid Co. v. Ethicon Ltd* [1975] AC 396. and hence the plaintiffs' application for injunction is dismissed with costs.

On the question of self-help, Hashim Yeop SCJ, as he then was, stated in *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors. v. Poh Swee Siang* at p. 413 as follows:

> ... Section 7 of the Specific Relief Act 1950 does not exclude the common law remedy of self-help. This is a remedy which is always available unless expressly excluded ...

Nevertheless such remedy is not always to be encouraged because of the consequences which it might bring about. Hence, Hashim Yeop SCJ offered the advice that:

> ... This however is not to be encouraged because of the disturbance which might follow but the legality of it is beyond question.

He continued at p. 414:

> Our Courts have consistently subscribed to the principle that one who has the right to enter upon another's land and act in excess of this right or after his right has expired is a trespasser - see *Sidek bin Hj. Muhamad and Letchumi Ammal v. Nam Fong Housing Sdn. Bhd.* [1982] CLJ (Rep) 168. Both these cases were decided by the former Federal Court and both appeals were heard about the same time by different quorums in early February and March 1982.

In India one must have an order in view of the Indian Specific Relief Act in order to go into possession of land. This Court does not take the same view. In other words, the Indian position is that a landlord is entitled to possession of his land from the tenant after the expiry of the period of tenancy. Yet, if the tenant holds over he may not dispossess him without the aid of the Courts. If he does so it is competent for the tenant to sue the landlord for possession.

The Court's view is clearly expressed at p. 413:

> We view ss. 7 and 8 of our Specific Relief Act differently. In the context of the provision of s. 7 the word 'may' is permissive and discretionary and it is not obligatory on the part of a person entitled to the possession of land to resort exclusively or solely to a Court of law. In other words s. 7 of the Specific Relief Act 1950 does not exclude the common law remedy of selfhelp. This is a remedy which is always available, unless expressly excluded ...

The defendants argued strenuously that Edgar Joseph Jr J should not use O. 89 and the Rules of the High Court 1980 to upset the decision of this Court on self-help. The learned Judge stated at p. 65 of the supplementary appeal record as follows:

> The plaintiffs have also relied on another change of circumstances and it is this:
>
> > It was argued, and I agree, that O. 89 of the Rules of the High Court 1980, (derived from the UK O. 113) which provides for a speedy and cheap process for plaintiffs to recover possession of immovable property was not yet in force at the time when the proceedings before Mustapha J were heard. The question that arises is: should not the plaintiffs now have recourse to this summary procedure to recover possession rather than resort to their Common Law remedy of self-help and run the risk of a breach of the peace? ... whether or not the evidence warrants such a conclusion is a matter which I can only determine after hearing the application on the merits ...

Edgar Joseph Jr J dealt with *Poh Swee Siang's* case in some detail. On the question whether ss. 7 and 8 of the Specific Relief Act 1950 exclude the Common Law remedy of self-help the learned Judge pointed out that the Supreme Court disagreed with certain Indian decisions that had answered the question in the negative. He made clear that the decision being on a point of law is binding on the High Court. At the same time he said that Counsel for the plaintiffs wanted to reserve this point for reconsideration by the Supreme Court as the Supreme Court is not bound by its own decision. See (*United Engineers (M) Bhd. v. Lim Kit Siang.* SC Civil Appeal No. 456/87)

The learned Judge then went on to deal with the two premises, viz. Nos. 258K/426 and 259H/301. In so far as No. 258K/426 was subject to the Rent Act. But, they opposed the granting of the interlocutory injunction to premises No. 259H/301. At p. 79 of the supplementary appeal record the learned Judge was satisfied:

> ... that there were also serious questions to be tried, as regards the plaintiffs' claim that they have an equity to remain in possession of dwelling house No. 301/259H.

He considered that "there are serious questions to be tried as to the plaintiffs' alleged right to remain in occupation not only of the two dwelling houses but the farm as well ...".

Before Edgar Joseph Jr J the defendants also raised a preliminary point on the question of plea of *res judicata* in its wider sense or issue esoppel. The learned Judge went into some detail over these matters. He came to the conclusion that the plea of *res judicata* or issue estoppel did not apply in the case before him. Even if the plea of *res judicata* or issue estoppel were to apply on the evidence such plea would fail.

We would like to point out that there is a distinction between, on the one hand, *res judicata* and, on the other hand, estoppel or issue estoppel. This distinction was made clear in the recent Australian case of *Chamberlain v. Deputy Commissioner of Taxation* [1987] 62 ALJR 324. The respondent had claimed a sum of $25,557.92 in respect of certain assessment and for additional tax. By agreed terms of settlement, judgment was given for the respondent the sum. Shortly after, the respondent issued a further writ in the same Court, the Supreme Court

in the Australian Capital Territory, in respect of the identical assessments and identical additional tax, claiming $230,021.28 with interests and costs. The defence couched on the language of estoppel but which the High Court took as signifying that the defendant was relying upon a plea of *res judicata*. In fact, the argument in the High Court touched on the applicability of *res judicata*.

The primary, Judge, Kelly J had ruled that there were special circumstances making the operation of *res judicata* inapplicable on the ground that the Commissioner had no power to excuse taxpayers from the statutory duty of paying taxes unless he was expressly authorised to do so by the statute. The Federal Court of Australia (Full Court) dismissed the appeal on different grounds, namely, the public policy requiring payments of debts due to the government overrode the underlying public policy underlying *res judicata*. The High Court did not accept these views. It affirmed that there was nothing in the Income Tax Assessment Act 1936 or arising from the respondent's position as a public officer that precluded the operation of *res judicata*. It held that the matter was not one for the discretion of the Court, for by operation of law the cause of action relied upon by the respondent had ceased to exist, because the cause of action had merged into the judgment in such a manner as to lose its independent existence.

Res judicata is quite distinct from estoppel or issue estoppel. There are some judicial dicta to the effect that by a plea of *res judicata* the other party is estopped from rekindling the earlier cause of action on which judgment was given. *Res judicata* cannot be treated simply as a branch of the law of estoppel. While it is true that an estoppel operates as a bar, this does not mean in reverse that all bars are estoppels. For instance, the bar due to statutes of limitation has nothing to do with estoppel and the same is true of the bar due to *res judicata*.

The object of an interlocutory interim injunction is to preserve matters in *status quo* until the case can be tried. Such an injunction is therefore usually so framed as to continue in force until the hearing of the cause or until further order. It cannot be considered in argument as affecting the ultimate decision of a cause.

In *Gilbert v. Endean* [1878] 9 Ch D 259 the matter was clearly stated by Cotton LJ at p. 268:

> ... those applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in *status quo* till the rights can be decided, or for the purpose of obtaining some direction of the Court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the Court ultimately to decide upon the rights of the parties ...

The same matters before us were argued in the Court below. The learned Judge had dealt with them some in details. We have not been persuaded that the learned Judge was wrong. We have no reason to interfere with his decision. Accordingly, we would dismiss the appeal with costs. Deposit to the defendants (respondents) on account of taxed costs.

Also found at [1989] 2 CLJ 967